LE COPY

Office Supreme Court, U.S.
FILED
JUN 15 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~1010~~ 150

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEVER, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT, *Appellants, Appellants,*

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG, AND BOROUGH OF RED HILL, *Appellees.*

**On Appeal From the Supreme Court of Pennsylvania**

## JURISDICTIONAL STATEMENT

PEYTON FORD
*Counsel for*
*Plaintiffs-Appellants*

*Of Counsel:*

J. HOWARD MCGRATH
ARTHUR JOHN KEEFFE
FORD, LARSON, GREENE AND HORAN

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Jurisdictional Statement | 1 |
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statute Involved | 2 |
| Questions Presented | 2 |
| Statement | 4 |
| The Questions are Substantial | 14 |
| Conclusion | 20 |

APPENDICES

| | |
|---|---|
| A. Opinion and Orders of Pennsylvania Supreme Court | 1a |
| B. Letter of February 10, 1960 | 13a |
| C. Original Complaint | 15a |
| D. Report of Tumarkin, Morgan & Emerman | 23a |
| E. Excerpts of Statute Involved | 26a |


## CITATIONS

CASES:


Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California, 346 U.S. 346 .. 2, 18
Coe v. Armor Fertilizer Works, 237 U.S. 413 ..... 2
Louisville & Nashville R. R. Co. v. Schmidt, 177 U.S. 230 ..... 2, 18
Nashville, Chattanooga & St. Louis R. R. v. Walters, 294 U.S. 405 ..... 2, 16, 17, 18
Pennoyer v. Neff, 95 U.S. 714 ..... 2
Postal Telegraph Cable Co. v. The City of Newport, 247 U.S. 464 ..... 15
Sam Thompson v. The City of Louisville, Oct. Term, 1959, Docket 59, — U.S. — ..... 19
Scheibner v. Baer (1896), 174 Pa. State 482, 34 A. 193.. 15

Page

Scott v. McNeal, 154 U.S. 34 ..... 2
Simon v. Craft, 182 U.S. 427 ..... 2
Watts, Watts & Co., Limited Unione Austriaca Di Navigazione, 248 U.S. 9 ..... 15
Windsor v. McVeigh, 93 U.S. 274 ..... 2, 15

U. S. Constitution:

5th Amendment ..... 3, 13
14th Amendment ..... 3, 13, 15

Statutes:

28 U.S.C., Section 1257 (2) ..... 2, 18
28 U.S.C., Section 2101 ..... 2
Municipal Authority Act of Pennsylvania, P.L. 382, May 2, 1945, Title 53, Purdon's Penna. Statutes Annotated, Section 301 et seq. ..... 3, 4, 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

---

No.

---

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEVER, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT, *Appellants, Appellants,*

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG, AND BOROUGH OF RED HILL, *Appellees.*

---

**On Appeal From the Supreme Court of Pennsylvania**

---

## JURISDICTIONAL STATEMENT

Appellants appeal from an order of the Supreme Court of Pennsylvania dismissing their complaint and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the Supreme Court of Pennsylvania, printed as Appendix A, is not yet reported.

## JURISDICTION

This suit was brought to enjoin the Appellees from going ahead with a proposed sewer construction program. The Order of the Supreme Court of Pennsyl-

vania was entered on April 26, 1960. Petition for Reargument was denied on May 26, 1960. Notice of appeal was filed in that Court on June 3, 1960. The jurisdiction of the Supreme Court of the United States to review this order of the Supreme Court of Pennsylvania is conferred by Section 1257 (2) and 2101 Title 28, United States Code. It is believed that the following decisions sustain the jurisdiction of the Supreme Court to review the order:

> *Windsor* v. *McVeigh*, 93 U.S. 274; *Pennoyer* v. *Neff*, 95 U.S. 714; *Scott* v. *McNeal*, 154 U.S. 34; *Louisville & Nashville R.R. Co.* v. *Schmidt*, 177 U.S. 230; *Simon* v. *Craft*, 182 U.S. 427; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Nashville, Chattanooga & St. Louis Railway* v. *Walters, Commissioner of Highways*, 294 U.S. 405; *Atchison, Topeka & Santa Fe Railway Co.* v. *Public Utilities Commission of California*, 346 U.S. 346.

## STATUTE INVOLVED

On May 1, 1958, the Upper [redacted]nery Joint Authority was created by the Boroughs of East Greenville, Pennsburg, and Red Hill pursuant to the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382, as amended and supplemented, 53 Purdon's Penna. Statutes Annotated Section 301 et seq. The Act contains no provision for a public hearing prior to the authorization and issuance of bonds by the Authority. Pertinent portions of the Act relating to bonds are set out at Appendix E.

## QUESTIONS PRESENTED

1. When three Philadelphia suburbs in which the average annual income is $3,800 create a Joint Authority that arbitrarily and capriciously insists upon con-

structing a sewer system to cost $2,500,000 involving an initial assessment of approximately $1,000 and an annual rental of approximately $69 per dwelling unit, and arbitrarily and capriciously refuses to call a public hearing at which reputable consulting engineers retained by Appellants at their own expense can establish that in many important respects the proposed sewage system is defective and should cost $1,500,000 or one million less, does their arbitrary and capricious refusal so to do, abridge the privileges and immunities of Appellants as citizens of the United States, deprive them of the equal protection of the laws, due process of law and take their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. When the Supreme Court of Pennsylvania upon demurrer dismisses *without a hearing before the Court of Common Pleas* of Appellants' complaint that alleges the above facts, and refuses to enjoin the proposed inefficient and expensive sewer system, does the Court thereby abridge the privileges and immunities of Appellants as citizens of the United States, deprive them of the equal protection of the Laws, due process of law and take their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Does the Pennsylvania Municipal Authority Act (P.L. 382, May 2, 1945) pursuant to which Appellee Upper Montgomery Joint Authority was created by the three Appellee suburbs, violate the Fourteenth Amendment to the United States Constitution in that it makes no provision for hearings of taxpayers before the Authority assumes bonded indebtedness and no provision for judicial review of actions of the said Authority?

## STATEMENT

The Boroughs of East Greenville, Pennsburg and Red Hill (hereinafter called the three suburbs) are suburbs of the City of Philadelphia.

Approximately 4,800 people live there of whom some 600 are retired on Social Security or are widows living on pensions. The average yearly income of a property owner is $3,800 per year. (Complaint, Appendix, Par. 14 (f) and Appendix D).

In October of 1946 the Pennsylvania Sanitary Water Board ordered the three suburbs to stop discharging their sewage into the waters of the Commonwealth and in 1947 they engaged Albright and Friel, Inc., a firm of consulting engineers who reported a sewage system, designed to serve 1,259 families and 4,000 people, would cost $763,000 but advised against it, because of its high cost. (Complaint, Pars. 9, 10, 11 and 13, Appendix C).

Time passed and in 1958 Appellees again engaged Albright and Friel, Inc., who submitted a new plan for a sewage system designed to serve 1,463 connections, to cost $1,950,000 with an annual rental of $49.95 (Complaint, Par. 12, Appendix C).

In 1958, the three suburbs created Upper Montgomery Joint Authority* (hereinafter called the Joint Authority) and, thereafter, under date of 25 January, 1960 Albright and Friel, Inc. submitted a third sewage plan, designed to serve 6,000 people and 1,534 dwelling units. By identical ordinances on 8 February, 1960, the three suburbs approved this plan to cost $2,500,000

---

* Pursuant to the Pennsylvania Municipal Authority Act of May 2, 1945, P.L. 382 as amended and supplemented 53 P.S. Section 301 et seq.

with an annual rental of $69.40 and an immediate charge of approximately $866,264 of the aggregate cost against properties benefited according to the foot front rule (Complaint, Pars. 7, 8, and 13, Appendix C).

On March 7, 1960, the three suburbs entered into a contract with the Authority to build the sewer system planned by Albright and Friel (Complaint, Par. 6, Appendix C).

At their own expense Appellants engaged Messrs. Tumarkin, Morgan and Emerman, a firm of consulting engineers of excellent repute (Complaint, Par. 14, Appendix C and Exhibit C annexed to the Petition for Reargument, Appendix D) to study the sewage system planned by Albright and Friel, Inc. Their study reveals that the proposed sewer system is defective in the following particulars:

1. *It is not economically feasible;*

2. *It is not a complete sewer system for each of the three suburbs;*

3. *It will only partially abate the discharge of sewage into the waters of the Commonwealth;*

4. *For the benefit of a relatively few persons whose sewage may have been polluting the waters of the Commonwealth, its construction and financing will place an unnecessary and unjustifiable burden upon the majority of the taxpayers and property owners;*

5. *It proposes construction of a third pumping station, three years hence, that will require additional sewer systems, pumping equipment, interceptor sewers and force mains that are not economically*

*feasible now and which will not be three years hence;*

6. *It will require an initial assessment of $1,000 against each property owner and an annual sewer rental of $69.40 per dwelling unit, an unjustifiable hardship when the average yearly income is but $3,800 per year and of the 4,000 persons who would use the project 600 are retired on Social Security or are widows living on pensions. (Complaint, Par. 14 (a), (b), (c), (d), (e) and (f), Appendix C and Exhibit C annexed to the Petition for Reargument, Appendix D).*

Moreover, on February 5, 1960 at an informal public meeting (not a "*hearing*" within the meaning of procedural due process) in Pennsburg, Albright and Friel, Inc., explained that their 1960 sewage plan was designed to serve 6,000 people at a cost of about $2,500,000 whereas their 1947 sewage plan costing $763,000 had been designed to serve only 3,000 people. This was said to involve a 30% increase in use over the 1947 system. If this "were the only factor involved" then the estimated cost of the 1960 sewer system "should have increased from the quoted figure of $763,000 in 1947 to approximately $991,000." (Complaint, Par. 13, Appendix C).

To understate the matter, the Appellees' consulting engineers, Albright and Friel, Inc., not only did not satisfactorily explain why the cost of their 1960 system so greatly exceeded the costs of their 1947 and 1958 systems, but Appellants were not permitted to show that the cost of the 1960 system is grossly exorbitant.

When the Appellants sought to bring these matters to the attention of the Appellees, to point out discrep-

ancies between the cost estimates of Albright and Friel, Inc., for the present construction and their cost estimates of previous plans, to obtain consideration of other preferable and less expensive alternatives Appellees "insisted that all investigation be put aside and that the sewer system as proposed in the Albright and Friel, Inc.. Report of January 25, 1960, be immediately and arbitrarily approved". (Complaint, Par. 15, Appendix C).

Appellees even went to the extent of writing threatening letters to Appellants and other taxpayers warning them "if they should proceed with legal action," the Appellees "would hold them individually and jointly responsible in substantial money damages." (Complaint, Par. 15, Appendix D).

Alleging these actions of Appellees were arbitrary and capricious, Appellants asked the Court of Common Pleas to enjoin them from proceeding. (Complaint, Pars. 17, 18 and Prayers for Relief).

Thereafter, the Appellees filed a petition in the Supreme Court of Pennsylvania asking it to take original jurisdiction. That Court did so and removed the case from the Court of Common Pleas where the complaint had been filed.

In an opinion filed April 26, 1960, the Supreme Court of Pennsylvania dismissed the Complaint (Appendix A and C). Since the Appellees demurred to the complaint, this decision by the Supreme Court of Pennsylvania is made on the basis that *all the allegations in the complaint are true.*

In other words the Court said that, even if the Appellants were able to establish all the factual allegations in the complaint and prove that the proposed sewer

system was defective in the particulars alleged and was costing more than it should, Appellants were not entitled to any *hearing* on their complaint.

After summarizing the above allegations, Judge B. R. Jones, speaking for the Supreme Court of Pennsylvania said:

> "The instant matter is presented upon the pleading, i.e., the complaint and the preliminary objections thereto in the nature of a demurrer. In passing upon the validity of these preliminary objections certain well-established principles are applicable: (1) preliminary objections admit as true only such facts as are well pleaded, material and relevant and only such inferences as are reasonably deducible from such facts; . . . (2) preliminary objections admit neither conclusions of law nor inferences unwarranted by the admitted facts nor argumentative allegations nor expressions of opinion; . . . (3) if to sustain the preliminary objections of a defendant will result in a denial of a plaintiff's claim or a dismissal of plaintiff's suit, such preliminary objections will be sustained only in those cases which are clear and free from any doubt:
>
> Does this complaint present a justifiable cause of action? Our analysis of its allegations indicates that it does not. With one exception, infra, the property owners' accusations are generalities and conclusions unsupported by factual averments. Allegations that the proposed sewer plan is economically not feasible, incomplete and will result in the imposition of an unnecessary and unjustifiable burden on the property owners in the triborough area find no support in the facts averred in this complaint. Assuming the truth of all the well pleaded, material and relevant facts and inferences reasonably deductible therefrom, such facts and inferences do not establish any such abuse

of discretion or arbitrary and capricious action on the part of these municipal officials such as warrants judicial interference. *Nowhere in the proceeding is there any allegation of any fraud or misconduct on the part of these municipal officials.*

The thrust of the property owners' accusations is that the Authority's consulting engineers estimated the cost of the proposed construction in 1946 at $763,000 whereas the same engineers, in 1960, estimated the cost of the proposed construction at $2,592,000. However, taking into consideration the larger number of dwelling units to be serviced, the tremendous and unprecedented rise in the cost of construction of *any* project during the fourteen year period between 1946 and 1960 and other factors, the increase in the estimated costs of this project between 1946 and 1960 does not, standing alone, justify our interposition in this matter.

The property owners want a hearing. Even if such hearing were held and *all* the facts *alleged* in the complaint were *proven*, judicial interference would be unwarranted. The legislature has vested in both the Authority and the Borough officials the power and responsibility of conducting governmental affairs in their respective areas: to such officials on the local level is given the right to exercise both judgment and discretion within the sphere of the legislative grant. Courts should be loath to interfere with or control the performance of the duties of such municipal officials: fraud, official misconduct, arbitrary and capricious abuse of power or discretion by municipal officials alone justify judicial intervention.

We have long recognized a presumption that municipal officers properly act for the public good.

Presumptively, these officials must be regarded as acting properly and for the public good. Absent any allegations in this complaint of either

fraud or misconduct and absent any allegations of fact which would indicate that these municipal officials have acted or are acting either in abuse of their power or in a capricious or arbitrary manner, judicial intervention cannot be justified. To label the actions of these officials as capricious or arbitrary does not make them so. *A hearing might indicate that the proposed plan is not as complete as it might be, that it involves a greater expenditure of money than the results would justify or that it was unwise at this time to enter upon such a plan.* However, the determination of such facts has been placed in the first instance in the discretion and judgment of the Authority and Borough officials and upon them has been placed responsibility under the law for such determination and judgment. Unless it can be shown—and the facts alleged in the complaint, even if proven, do not so show—that the discretion and judgment of such officials have been motivated by fraud or by complete lack of responsibility or by arbitrary considerations or capricious beliefs, no court should substitute its judgment for that of such officials. To do so would constitute an unwarranted judicial interference with the duties of duly appointed and elected public officials.

Even if the property owners proved all the facts set forth in their complaint, as distinguished from the conclusions of law, such facts do not show such conduct on the part of the municipal officials as to justify our interference with their discretion and judgment.

In view of the conclusion which we have reached, it is unnecessary to consider the question whether the property owners are guilty of laches under the circumstances.

The preliminary objections are sustained and the complaint dismissed with prejudice at plaintiffs' costs.' (Emphasis supplied)

After this decision by the Supreme Court of Pennsylvania, the Appellants petitioned for reargument and suggested that the Court had misapprehended the significance of the above-mentioned factual allegations in the complaint, especially paragraphs 14, 15, 16 and 17 summarized *supra* (See the Complaint, Appendix C)

To their Petition for reargument, Appellants annexed an opinion letter from their consulting engineers, Messrs. Tumarkin, Morgan and Emerman, dated 31 March 1960 (Appendix C) which points out that the proposed sewer system is further defective, in that:

(a) *The decision of Appellees "to install two sets of sewers in alleys parallel to and in lieu of one sewer in Main Street aggravates the present situation," increases the cost and is "further proof that this project is not economically feasible." It doubles the "linear feet of pipe required."*

(b) *"The drawings do not indicate that test pits and/or borings were taken along the center line of the proposed sewer."*

(c) *The plans and report of Albright and Friel, Inc., indicate there are approximately 120,000 linear feet of sewer pipe and a primary and secondary treatment plant, designed for 6,000 people. Under today's high prices not including rock excavation, the average cost for this sewer system is $50,000 per mile plus $300,000 for the cost of one primary and secondary sewage treatment plant, including interceptor sewers, and the cost of the overall sewer system with two pumping stations should be approximately $1,500,000."*

(d) *And "of the 1,800 persons who would use the project, 600 are retired on Social Security or are widows living on pensions and can ill afford to pay for their share of this expensive project."*

(e) *Albright and Friel, Inc.'s proposed sanitary sewer system "is not a complete system for each Borough" and there are "homes and other buildings that will not connect to the proposed sewers. Taxpayers not abutting on the sewer lines can dispose of their sewage cheaply.*

(f) *Since neither taxpayers who do not abut on the sewer lines nor the schools, which have their own sewage disposal system "are not included for connection," the Appellees are deprived of large sewer rentals and the abutting taxpayers are thus obliged to carry an unfair percentage of the total cost.*

(g) *212 homes in the three suburbs and the surrounding watershed area will not be connected to Albright and Friel, Inc.'s proposed sewage system and this means that "sewage disposal into the waters of the commonwealth will only be partially abated." Therefore, "over 16% of the homes, which may be polluting the watershed streams, will not be connected and therefore would not be abating and possibly continuing the nuisance."*

(h) *Under Albright and Friel, Inc.'s proposed sewage plan, the majority of the taxpayers who abut the new sewer lines will be paying for a sewer system required to abate a nuisance created by a minority of taxpayers abutting existing sewers.*

(i) *"Economy, at present can best be realized by considering a design for 6,000 people for twenty years with two small disposal plants and one pumping station."*

(j) *The fearful burden of taxation threatening these three suburbs by the $2,500,000 cost of Albright and Friel, Inc.'s proposed sewage system can be eased by the use of "settling tanks, cesspools and for septic tanks, etc. for isolated houses and farms," thereby reducing the linear feet of pipe required.*

Despite this more detailed showing in the Petition for Reargument, and despite specific allegations therein, that (a) the refusal of Appellees to give Appellants a hearing at which Messrs. Tumarkin, Morgan and Emerman could present their findings; (b) the refusal of the Supreme Court of Pennsylvania to grant such a hearing before the Court of Common Pleas; and (c) the failure of the Pennsylvania Municipal Corporation Act (PL. 382, May 2, 1945), under which the Joint Authority was organized, to provide for hearings before the Authority or judicial review of the Authority's actions, abridged the privileges and immunities of Appellants as citizens of the United States, deprived them of due process of law and took their property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, the Supreme Court of Pennsylvania on May 26, 1960, denied Appellants' Petition for Reargument.

## THE QUESTIONS ARE SUBSTANTIAL

When a property owner's average annual income is but $3,800, to assess him $1,000 and inflict upon him an annual rental of $69.40 is cruel.

The $1,000 assessment is almost one third his annual income.

Moreover, of the 4,800 persons this sewage district is to serve, 600 are retired living on Social Security or widows living on pensions.

If this costly sewage district is built many of these people are bound to lose their homes.

The Appellants at their own expense have retained consulting engineers who say that there are basic defects in the proposed sewage district and the sewage district proposed can be built for $1,500,000 instead of the $2,500,000 that Appellants propose to spend. This is a saving of about one million dollars.

Yet, as we have seen, not only the Appellees, but also the Supreme Court of Pennsylvania refuse to give the Appellants a hearing at which their consulting engineers may testify in detail to substantiate the allegations in the complaint (Appendix C) and in their opinion letter of 31 March, 1960 (Appendix D).

To prevent their suing to enjoin this inefficient and expensive sewage district Appellees even went to the length of threatening taxpayers who exercised their legal right to sue. Annexed as Appendix B is a sample of the intimidating letter sent to complaining taxpayers.

In this Court it is quite immaterial whether what Appellants allege be true. We do not ask this Court and we did not ask either Appellees or the Supreme

Court of Pennsylvania to accept as true what the Complaint (Appendix C) alleges or what the opinion letter of our consulting engineers (Appendix D) sets forth.

*What we do say is that Appellant taxpayers are entitled to be heard. Fairness requires that the Supreme Court of Pennsylvania allow the Appellants to prove, if they can, the allegations of their complaint.*

On the authority of Statements by Mr. Justice Field in *Windsor* v. *McVeigh*, 93 U.S. 274, the Supreme Court of Pennsylvania, long ago, itself, said:

> "No man, in this state, can be deprived of his property except by a proceeding judicial in its nature, and as such involving as an indispensable requisite an opportunity of being heard." (*Scheibner* v. *Baer* (1896), 174 Pa. State 482, 34 A. 193 at 194) See also: *Watts, Watts and Company Limited* v. *Unione Austriaca Di Navigazione* (1918), 248 U. S. 9 at pp. 21-22.

In *Postal Telegraph Cable Company* v. *City of Newport, Kentucky* (1917), 247 U.S. 464, Mr. Justice Pitney put the point this way:

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

Thus, the Supreme Court of Pennsylvania has denied Appellants their constitutional right to be heard by the Appellees and the Court of Common Pleas.

This entitles them to appeal to this court.

The problem does not differ in principle from *Nashville, Chattanooga and St. Louis Railway* v. *Walters, Commissioner of Highways* (1935), 294 U.S. 405.

Just as here Appellants do not question the right of the Appellees to construct a sewage system so the Railway there, did not question the right of the Tennessee State Highway Commission to compel it to eliminate grade crossings. However, unlike our case the Railway there, conceded that $17,400 was a reasonable cost for the elimination of the particular crossing in question. Also, unlike our case, the trial court took over 492 printed pages of testimony and held that an order of the Highway Commission imposing one half the cost of eliminating the grade crossing upon the Railway, was arbitrary, unreasonable and void. Upon appeal, the Supreme Court of the State reversed the decree of the Trial Court and ordered the bill of complaint dismissed.

In so doing the Supreme Court of Tennessee there, acted the way the Supreme Court of Pennsylvania has acted here in dismissing the complaint of Appellants. It

> "declined to consider the special facts relied upon as showing that the order and the statute as applied were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings." (p. 414)

Holding first, that facts were alleged showing that the action of the Highway Commission was arbitrary and unreasonable and second, that the Supreme Court of Tennessee erred in not giving them consideration, Mr. Justice Brandeis, speaking for a unanimous court reversed the order dismissing the bill of complaint, saying:

> "Third. We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the state court to hold that the statute and order complained of are abitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State.
>
> Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight. We have also no occasion to consider whether the Railway should bear a proportion of the cost of the underpass less than one-half."
>
> "The judgment of the Supreme Court of Tennessee is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion."

Just as in *Nashville, Chattanooga and St. Louis Railway* v. *Walters, Commissioner of Highways*, the Supreme Court of Pennsylvania here, refuses to con-

sider the allegations in Appellants' complaint and dismisses it without any hearing at all.

Because the demurrer admits the truth of the allegations in the complaint, it follows that the Appellants are to have their property taken without just compensation.

As this Court said in *Atchison, Topeka and Santa Fe Railway Co.* v. *Public Utilities Commission of California* (1953) 346 U.S. 346 when a State Commission makes arbitrary and capricious orders it:

> "must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. Section 1257 (2). . . . The Appellants presented squarely to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, *and the cases are properly here on appeal.*" (pp. 348-349)

Of course, in the Nashville case *supra*, the Trial Court took testimony and in the *Atchison, Topeka and Santa Fe* case, the Public Utilities Commission of California had held hearings at which the Railways were able to offer evidence in support of the allegations of their complaint. In our case not only the Joint Authority and its three suburbs but also the Supreme Court of Pennsylvania refuses Appellants an opportunity to call Messrs. Tumarkin, Morgan and Emerman, their reputable consulting engineers, to a

hearing at which they can offer evidence in support of the allegations in their complaint.

*A fortiori* in a case such as ours this Court has jurisdiction of this Appeal and a substantial question is presented for decision.

The right Appellants ask the Court to protect is more than substantial. It is the most precious right Americans have—their Day in Court before the State of Pennsylvania acting arbitrarily and capriciously through Appellees takes their property without just compensation.

Perhaps, the grandest case at the October, 1959 Term or any Term was Docket 59, *Sam Thompson* v. *City of Louisville*. There, the Court reached down to the City of Louisville to reverse the unjust conviction of Shufflin' Sam Thompson for loitering and disorderly conduct at the Liberty End Cafe. Sam was charged with dancing by himself and not eating and not drinking when as a matter of fact he was "eating a dish of macaroni" and drinking "a glass of beer" and with the proprietor's permission "shuffling his feet in rhythm with the music of the juke box." Reversing Sam's conviction on both charges and remitting his $10 fine for each, Mr. Justice Black, for a unanimous Court, held "the charges were so totally devoid of evidentiary support as to render Sam's conviction unconstitutional under the due Process Clause of the Fourteenth Amendment", and he said:

> "Just as 'Conviction upon a charge not made would be sheer denial of due process' so is it a violation of due process to convict and punish a man without evidence of his guilt."

## CONCLUSION

As tragic, if not more tragic, to Suburbia U.S.A. would be to allow the Appellees arbitrarily and capriciously to tax for an inefficient and needlessly expensive sewage system.

As we have seen, some 600 of the residents are retired living on Social Security or widows living on pensions. The 4200 other residents for the most part are young people of America—ex G.I.'s from World War II, beginning married life and raising their children in the suburbs.

To these individuals whose annual income averages but $3,800., an unnecessary assessment of $1,000. with annual charges of $69.40 is a family catastrophe. It could mean the loss of their homes.

When public-spirited citizens, such as Appellants, at their own expense, retain a consulting engineering firm of good repute, which after study, finds important defects in the plan and concludes its cost should be $1,500,000. or one million less than the estimated $2,500,000., the least that Appellees and the Supreme Court of Pennsylvania can do, is to hear them.

Not only for the protection of Appellants and the others who dwell in these three Philadelphia suburbs, but for the protection of Suburbia U.S.A. the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

PEYTON FORD
*Counsel for*
*Plaintiffs-Appellants*

*Of Counsel:*

J. HOWARD MCGRATH
ARTHUR JOHN KEEFFE
FORD, LARSON, GREENE AND HORAN